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No. 04-6432

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,
Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary for the Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

The question on which the Court granted certiorari pits the Eleventh Circuit's categorical prohibition of Rule 60(b) in habeas corpus cases against the functional approach adopted by nearly every other circuit. Respondent's brief does not directly defend the categorical bar and instead restates the issue to suggest that the Eleventh Circuit's decision was more fact-based than categorical.[1] Amicus Curiae United States expressly disavows the Eleventh Circuit's holding that all Rule 60(b) motions (except those for fraud) are prohibited, conceding that the Eleventh Circuit's "categorical prohibition on all other grounds for relief under Rule 60(b) *goes too far*," U.S. Br. 24 (emphasis added), and acknowledging that "fraud is not the only type of non-clerical error that falls outside AEDPA's reach." *Id.* at 25-26 (offering examples of the overbreadth of the Eleventh Circuit's categorical rule). *Amicus Curiae* Criminal Justice Legal Foundation ("CJLF") makes a similar concession, identifying specific instances in which Rule 60(b) motions are proper, including the case of an intervening change in law. CJLF Br. 19, 23-24.

Amici Curiae States of Tennessee, et al. ("States") address the question as presented, but confine their argument to a situation not present here, potential abuse of Rule 60(b) by death row litigants. As we discuss, *infra* at 16-17, the States get less relief from the Eleventh Circuit's decision than from a functional application of Rule 60(b).

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[1] Respondent's "restated" issue, "Whether a Rule 60(b) motion seeking to relitigate the final disposition of a federal habeas petition constitutes a prohibited 'second or successive' petition under 28 U.S.C. § 2244(b)(1)," Resp. Br. i, misses the thrust of the question presented, the correctness of the categorical bar imposed below. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1261, 1285-86, 1287 (11th Cir. 2004) (en banc) (affirming district court order that it *lacked jurisdiction* over Rule 60(b) motion); JA 21, 78.

I. Respondent Ignores Cardinal Rules of Statutory Construction, Overlooks the Court's Traditional Analytical Formulation in Construing AEDPA, and Responds Instead to a Distortion of Mr. Gonzalez's Arguments.

Respondent avoids application of the Court's traditional and accepted analytical framework for interpreting AEDPA and the cardinal rules of statutory construction that have guided that process. *See* Pet. Br. 14-39. Instead, Respondent engages in *argumentum ad absurdum*, straining to create strawman readings of both Rule 60(b)(6) and Mr. Gonzalez's argument: "Gonzalez asks this Court to hold that Rule 60(b)(6) . . . may be used to reopen closed habeas cases, solely on the basis of subsequent changes in decisional law occurring years after habeas relief was denied." Resp. Br. 9.[2] Mr. Gonzalez makes no such broad or simplistic claim. His answer to the question presented is manifold: (a) Rule 60(b) motions in habeas corpus cases are not categorically prohibited in all instances, but rather they must be sorted individually based on the functional approach applied by the

[2] In an effort to make it appear that Rule 60(b) traffic will be unmanageable, respondent notes that a cursory LEXIS search of the term "successive" within a paragraph of the term "60(b)" produces a list of 300 circuit court decisions. Resp. Br. 45 n. 35; *cf.* Abdur'Rahman Br. 5 (noting that 330 Rule 60(b) motions have been filed since the effective date of AEDPA). Review of those cases reveals that about 200 involve the interplay between AEDPA's successive petition bar and Rule 60(b). That is an average of fewer than two cases per circuit per year for each of the nine years that AEDPA has been in effect. Moreover, many of the LEXIS citations are one-time threshold determinations of the continuing viability of Rule 60(b), a question that will not recur after the decision here. Even if one includes all 330 cases, on average each federal circuit has addressed just three such cases per year. Most opinions were brief and officially unpublished, and none indicated that the issue contributed significantly to the workload of any court. Respondent's statistics, like those of *Amicus Curiae* Abdur'Rahman, confirm that Rule 60(b) coexists comfortably with AEDPA.

vast majority of circuits; (b) Rule 60(b)(6) may permit relief from a final judgment in the case of an intervening change in law, *if coupled with exceptional circumstances*; (c) A district court has discretion to reopen a habeas judgment dismissing claims of facial merit as a result of a mistakenly applied procedural bar—*e.g.*, statute of limitations or exhaustion—based on an intervening decision that establishes that the dismissal was a mistake of existing law, if coupled with exceptional circumstances; (d) Rule 60(b)(6) relief may be available to reopen a final habeas corpus judgment incorrectly decided on the merits of a claim, based on a supervening Supreme Court decision that is retroactively applicable under *Teague v. Lane*, 489 U.S. 288 (1989); and (e) Rule 60(b), with its "reasonableness" temporal limit, is not inconsistent with the congressional intent expressed in AEDPA, which, in exceptional circumstances, imposes no temporal limits on opening or reopening habeas litigation. *See* AEDPA §§ 101 and 106, codified at 28 U.S.C. § 2244(b)(2) and (d)(1)(C).

Respondent seeks to avoid addressing the Due Process and Suspension of the Writ concerns raised by the Eleventh Circuit's decision by repeating the erroneous incantation that those considerations are not properly before the Court. Resp. Br. 31 n. 25. Both the Due Process and Suspension of the Writ contentions made here by Mr. Gonzalez were advanced by him below[3] and in support of Question

[3] Respondent takes out of context a footnote in one of petitioner's *en banc* briefs below that distinguishes the Due Process claim from a Suspension of the Writ claim, but respondent notably fails to advise this Court that in later court of appeals briefing petitioner detailed a separate Suspension of the Writ argument. *En banc* briefing came in two stages. In the second stage, the court of appeals directed the parties to answer two more questions in a supplemental letter brief, including whether AEDPA could "inform" whether Rule 60(b) relief remains available post-AEDPA. JA-11 (6/27/2003). Petitioner filed his Supplemental Brief, beginning with the preface, "As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations . . ."

One of the petition for writ of certiorari, on which the Court granted review.[4]

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followed by a summary of the argument: "(a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; . . ." JA-11 (7/11/2003) at 1, 3. Petitioner then argued the Due Process claim, *id.* at 4-8, and made a Suspension of the Writ argument. *Id.* at 8-10. He incorporated the same arguments in response to the court of appeals' second question, *id.* at 13, and summarized the constitutional argument in the concluding paragraph of his supplemental brief. *Id.* at 15.

[4] The substance of Question One, on which this Court granted certiorari, includes both the Suspension of the Writ and Due Process issues. Pet. 19-22, 29. Although the same principles were also advanced in support of Question Two, on which certiorari was not granted, the argument in support of Question One certainly included both the Due Process and Suspension of the Writ contentions. For example, the introduction to Issue I(B)(1) reads: "[T]he court of appeals' holding is inconsistent with the analytical framework used by this Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds . . . and violates both the Due Process Clause of the Fifth Amendment and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9." Pet. 17. This is followed by a sub-point heading to Issue One: "(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9." Pet. 17. The argument in support of that sub-point begins: "When a literal reading of AEDPA would collide with the Constitution, the Court has read the language differently, or seized upon Congressional silence or AEDPA's incorporated habeas corpus jurisprudence, to avoid the collision. Three illustrations of this analytical approach are *Slack v. McDaniel* [ ], *Felker v. Turpin* [ ], and *Martinez*-Villareal v. Stewart [ ]." Pet. 17-18 (citations omitted). The conclusion to the argument on Question One includes this summary: "The Eleventh Circuit's formulation of a bright line rule violates both the Due Process Clause of the Fifth

To the extent respondent does address the grave constitutional doubt arising from the interplay of AEDPA and the Due Process and Suspension clauses, he does so in a footnote, claiming the Suspension Clause issue is "foreclosed by *Felker [v. Turpin]*, 518 U.S. [651] at 658, 664 [(1996)]." Resp. Br. 31 n. 25. Only an overly-parsed reading of *Felker* could lead to such a conclusion, since *Felker*'s trajectory was specifically redirected to avoid Suspension Clause concerns. To "obviate any claim by petitioner under the . . . Suspension Clause," the Court held that neither AEDPA nor congressional silence repealed the Court's authority to entertain original habeas corpus proceedings. *Felker*, 518 U.S. at 660-61. Rather than foreclosing the Suspension Clause issue raised by Mr. Gonzalez, *Felker* provides a strong example of the Court's careful approach to analyzing the meaning of AEDPA, guiding decisions away from grave and doubtful constitutional interpretations. The other decision cited in respondent's argument, *Lonchar v. Thomas*, 517 U.S. 314 (1996) (rejecting district court's *ad hoc* equitable laches rule barring first habeas petition), also demonstrates how the Court's decisional compass has been altered to avoid collision with the Suspension Clause. *Id.* at 1299.[5]

Amendment and, in a separate context, the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 . . . ." Pet. 26.

[5] Amicus Curiae CJLF has its own unique approach, arguing that the Suspension of the Writ Clause is "[l]ike the monster in a series of bad horror movies[;] this argument keeps coming back no matter how many times it appears to have been killed." CJLF Br. 27. We do not share CJLF's cinematic view of the Suspension Clause, and we reject their contention that "[i]t is high time for this Court to bury it for good." *Id.* Our own view is reinforced by the argument CJLF makes in the preceding paragraph, in which it concedes, "The successive petition rule enacted by Congress [in AEDPA, 28 U.S.C. § 2244(b)(1)] is considerably more stringent than this Court's pre-AEDPA cases." CJLF Br. 27. This is precisely the point made in Mr. Gonzalez's initial merits brief: Because the absoluteness of AEDPA's successive petition bar goes far beyond the

Respondent contends that the Suspension and Due Process clauses are not violated if an improper dismissal is based upon the law as it then existed. That is not the case here, since the controlling law at the time of the district court's incorrect dismissal was the same as it is today and the same as it has been since AEDPA was adopted: § 2244(d)(2) tolls the statute of limitations while a petitioner's state petition is pending. The law did not change; the Court's intervening decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), simply corrected the lower courts' mistaken interpretation of existing law. *See Fiore v. White*, 528 U.S. 23 (1999) (quoting *Buradus v. General Cement Prods. Co.*, 356 Pa. 349, 52 A.2d 205, 208 (1947) ("[i]n general, the construction placed upon a statute by the courts becomes a part of the act, *from the very beginning*")) (emphasis in original). And, as Mr. Gonzalez has argued, dismissing a facially meritorious first habeas petition in violation of existing law suspends the writ and denies the due process right to have statutory habeas corpus review. Pet. Br. 32-39.

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compass of prior habeas jurisprudence, it goes beyond the outer boundary where lurks the Suspension Clause. Pet. Br. 34-36. The Suspension Clause boundary serves to redirect the Court's analytical trajectory away from grave questions of unconstitutionality to interpretations that avoid such difficulties because "the avoidance canon rests upon our 'respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Harris v. United States*, 536 U.S. 545, 556 (2002) (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)). *Felker v. Turpin*, *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), present examples of this effect. In *Felker* the Court avoided a Suspension issue by asserting its own original habeas jurisdiction. In *Martinez-Villareal* and *Slack*, the Court avoided constitutional questions by holding that a re-asserted claim, though technically a renewal of an original claim, is not necessarily "second or successive" if the prior claim was not adjudicated on its merits. As all three cases prove, the Suspension Clause is alive, well, and continuing to impact the Court's decision-making.

II. Respondent and His Amici Overstate the Just Role of Finality in Habeas Corpus Litigation Generally and in the Present Case, in Particular.

The interest in finality of habeas litigation is not absolute, as respondent and his amici presume. The Court made that very point recently in *Rhines v. Weber*, 544 U.S. ___, 125 S. Ct. 1528 (2005), addressing the instance in which requirements of the habeas law and orders of the court "unreasonably impair the prisoner's right to relief," *id.* at 1535 (quoting *Rose v. Lundy*, 455 U.S. 509, 522 (1982)), on "claims that are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory tactics." *Rhines*, 125 S. Ct. at 1535. "In such a case," the Court found, "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." *Id.*

Rhines is instructive here, where the interplay of AEDPA and mistaken court rulings deprived Mr. Gonzalez of the right to have his exhausted, timely-filed, and facially meritorious claim heard and decided. *See* 28 U.S.C. § 2254 ("a district court *shall* entertain an application for writ of habeas corpus" that is timely, has exhausted claims, and upon which state remedies are unavailable or ineffective). Likewise, he was erroneously deprived of an appeal of that erroneous judgment due to the erroneous withholding of a certificate of appealability as to the district court's misinterpretation of AEDPA's statute of limitations, *Slack v. McDaniel*, 529 U.S. at 478 (AEDPA allows for issuance of COA for procedural dispositions not based on constitutional issue), in a *pre-Slack* order that erroneously required an appellate issue of constitutional dimension. JA-16 ¶ 31. Then, when he timely petitioned the court of appeals for rehearing of the COA denial, the clerk of court *returned his petition unfiled*, due to confusion over appellate case numbers, and advised him, erroneously, that the rehearing motion related to an appeal

that was dismissed and closed six months earlier. JA-16 ¶ 33. The repeated misinterpretation of AEDPA and erroneous court rulings "unreasonably impair[ed] the prisoner's right to relief" on timely-filed "claims that are potentially meritorious" and were presented without dilatory tactics by the petitioner. *Rhines*, 125 S. Ct. at 1525. Due to these breakdowns in the ordinary functioning of the courts, Mr. Gonzalez did not receive a full or fair determination of his claims, and the judgment in his case lacks the integrity to have finality.

This is not to say that Rule 60(b) is without encumbrances in habeas corpus cases. As Mr. Gonzalez readily acknowledges, habeas law can constrain a court's discretion to grant a Rule 60(b) motion. *See, e.g.*, Pet. Br. 44 n. 23, 47 (*Teague* limitations apply). But that is far different from saying that habeas law categorically prohibits entertaining such a motion at all. Decisions cited by respondent and his amici, *Pitchess v. Davis*, 421 U.S. 482 (1975) (discretion to grant Rule 60(b) subject to exhaustion requirements), *Browder v. Director*, 434 U.S. 257 (1978) (Fed. R. Civ. P. 81(a)(2) does not preclude application of Rules 52 and 59 in habeas cases; implying same for Rule 60(b)), and *Harris v. Nelson*, 394 U.S. 286, 298-300 (1969) (civil discovery rule granting litigant right to propound interrogatories does not apply in habeas cases, although habeas judge may exercise discretion to permit any type of appropriate discovery, including interrogatories), stand for the proposition already acknowledged: The *discretion* to grant a Rule 60(b) motion may be *constrained* by habeas law, but a district court is not *categorically barred* from granting appropriate relief. The Court highlighted this difference in *Rhines*, in which it considered the right of a district court to stay a habeas proceeding where AEDPA does not plainly prevent it, but the purposes of AEDPA are seemingly disserved by such a stay. "AEDPA does not deprive the district courts of that authority" the Court said, "but it does circumscribe their discretion." *Rhines*, 125 S. Ct.

at 1534. The same may be said for Rule 60(b): AEDPA does not deprive the district courts of that authority—it simply guides their discretion.

III. Neither *Calderon v. Thompson* nor *Plaut v. Spendthrift Farm* Justifies the Eleventh Circuit's Categorical Prohibition of Rule 60(b) Motions in Habeas Corpus Cases.

Respondent and his some of his amici rely on *Calderon v. Thompson*, 523 U.S. 538 (1998), to support the Eleventh Circuit's categorical rule. Mr. Gonzalez addressed that contention in his initial brief. Pet. Br. 23-25. Now, Amicus Curiae United States also contends that the Eleventh Circuit's reliance on *Calderon* is misplaced. U.S. Br. 26 n. 17. A number of important distinctions support this conclusion.

First, *Calderon* does not set forth a categorical prohibition of a congressionally-approved rule of procedure, as does the court of appeals' decision below, but, rather, holds that AEDPA policies may circumscribe an appellate court's discretion to exercise extraordinary judicial powers on its own initiative.[6] Second, the holding in *Calderon* was directed at delayed claim relitigation occurring long afer the habeas petitioner's claims had been actually decided on the merits, following evidentiary and other hearings, and after a full appellate review of those merits determinations all the way to this Court. To borrow respondent's metaphor, Mr. Thompson certainly had repeated bites at the habeas apple. The same cannot be said about Mr. Gonzalez's case, since his claims were never decided and he was erroneously denied an opportunity to appeal the federal district court's order of

[6] Thus, even respondent does not suggest that Mr. Gonzalez's petition for rehearing under Fed. R. App. P. 40, filed April 18, 2000, could be deemed a successive application for habeas relief simply because the court of appeals issued its mandate simultaneously with its April 6, 2000 denial of petitioner's COA motion.

dismissal because neither the district court nor the court of appeals would grant a COA permitting an appeal. Mr. Gonzalez never got to bite at the apple at all.

To avoid this significant distinction between cases, respondent and his amici rely on an inapposite definition of "on the merits" in *Plaut v. Spendthrift Farm*, 514 U.S. 211, 228 (1995), to make it appear that the summary dismissal of Mr. Gonzalez's habeas petition was a bite at the habeas apple. Resp. Br. 34; U.S. Br. 18. But *Plaut* does not apply here. *Plaut* was a civil securities fraud case in which an Act of Congress permitted a class of dismissed cases to be reopened. The Court struck down the Act "on separation of powers grounds" because it "required federal courts to reopen final judgments that had been entered before the statute's enactment." *Miller v. French*, 530 U.S. 327, 343 (2000). Discussing its conclusion, the *Plaut* Court noted that rules of finality treat a limitations-based dismissal of an *action for money damages* as a judgment on the merits, but "was careful to distinguish the situation before the Court in that case—legislation that attempted to reopen the dismissal of a suit seeking money damages"—from other judgments not involving money damages, particularly those with "prospective effect." *Miller v. French*, 530 U.S. at 344. *Plaut*'s characterization of a limitations-based dismissal of a judgment for money damages does not extend to the context of habeas corpus cases, and neither respondent nor his amici have identified a habeas corpus decision of the Court that applies *Plaut* in this way.

The Court has not applied the technical *Plaut*-type "merits" definition, *cf.* Fed. R. Civ. P. 41(b), to the habeas corpus setting. Rather, the Court has used a functional analysis to decide if a petitioner had a bite at the habeas apple. In cases construing AEDPA and pre-AEDPA habeas law, the Court has not counted a bite at the apple if the habeas petitioner's claims were not previously decided, regardless of the

technical way in which the disposition was framed and even where dismissals were correctly ordered, for otherwise "the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal v. Stewart*, 523 U.S. at 644 (holding, for purposes of "second or successive" bar, procedurally dismissed claim does not count as determination on merits); *see, e.g., Slack v. McDaniel*, 529 U.S. at 488 (holding that original dismissal was procedural, not on the merits—and therefore new petition was not second or successive—because "'[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court").

Calderon v. Thompson set forth a rule of discretion limiting repeated bites at the apple for a habeas petitioner who had a first bite plus many more, especially when the final bite (mandate vacatur) was not a process authorized by court rules or regularly allowed by jurisprudence. The *Calderon* rule of discretion does not apply to Mr. Gonzalez, who was erroneously denied any bite at the habeas apple, and has invoked a formal rule of court to correct that mistake, "Rule 60(b), which authorizes discretionary judicial revision of judgments . . . reflect[ing] and confirm[ing] the courts' own inherent and discretionary power," *Plaut*, 514 U.S. at 234-35, "firmly established in English practice long before the foundation of our Republic," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), "to set aside a judgment whose enforcement would work inequity." *Plaut*, 514 U.S. at 235.

IV. Mr. Gonzalez Did Not Default His Claims in State or Federal Court.

Respondent argues that Mr. Gonzalez cannot benefit from the tolling provisions of 28 U.S.C. § 2244(d), contending his collateral review petition was not properly before the Florida courts since it was filed outside Florida's general two-year limitations period. Resp. Br. 40 n. 33. Respondent overlooks both the law and the facts. Florida's general statute of

limitations for seeking postconviction relief has an exception for newly discovered evidence if the motion "alleges that . . . the facts on which the claim is predicated were unknown to the movant . . . and could not have been ascertained by due diligence . . . ." Fla. R. Crim. P. 3.850(b)(1). Mr. Gonzalez made such an allegation in both his state and federal petitions. JA-2 DE 5 (Appendix to State's Response) Ex. C at 2; JA-1 DE 1 at 5 ¶ 12.A. Florida courts treated his collateral relief motion as properly filed.[7] Respondent's continuing dispute on this issue merely repeats the warden's argument rejected by the Court in *Artuz v. Bennett*.

The United States alleges a never-before-announced procedural default, that Mr. Gonzalez's failure to pursue certiorari review to this Court from the denial of a COA "disqualif[ies] him" from Rule 60(b) relief. U.S. Br. 29. Unable to cite authority for this proposition, the government compares the obligations imposed by *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), which requires a state prisoner to exhaust his claims by seeking discretionary review in the *state* supreme court. U.S. Br. 30. This innovative contention fails for three reasons. First, the Court has never required certiorari review as a precondition to consideration for relief under Rule 60(b). Second, the requirement of *O'Sullivan v. Boerckel* is a rule of federalism and comity, requiring exhaustion of all *state* review before a claim ripens for federal

[7] The state trial court addressed the motion on its merits, but "denied" it because "the allegations contained therein do not constitute legal grounds for granting the New Trial or release of the prisoner, and the motion being insufficient in substance to support the relief prayed." JA-2 DE 5 Ex. I (Order Dec. 26, 1996). That order was affirmed by the state court of appeal on April 9, 1997, rehearing denied on May 8, 1997. *Id.* The federal statute of limitations was tolled, therefore, from November 25, 1996 (when the state motion was filed) until it was finally denied by the state courts on May 8, 1997. Mr. Gonzalez filed his federal habeas petition in June, 1997. With statutory tolling, the petition was filed less than nine months into the one-year limitations period.

habeas corpus. Neither federalism nor comity apply to, or require a prisoner to seek, a writ of certiorari in the U.S. Supreme Court. *See Thomas v. Crosby*, 371 F.3d 782, 813 n. 15 (11th Cir. 2004) (Tjoflat, J., specially concurring) (requirement that state prisoner seek certiorari from the United States Supreme Court has been rejected). Third, on April 18, 2000, Mr. Gonzalez filed a timely petition for rehearing directed to the court of appeals' April 6, 2000 denial of a COA, but the clerk of the court of appeals *returned the motion unfiled* (apparently due to confusion over case numbers), explaining, erroneously, that his appeal was *dismissed and closed on October 28, 1999*. This official misinformation carried the weight of a court decision and was enough to convince a *pro se* litigant (and some lawyers) that the 90-day window for filing a certiorari petition expired, as well. It would be unfair to impose a new rule of default on Mr. Gonzalez for failing to seek further review of the denial of a COA, when his very efforts to accomplish that were erroneously returned unfiled with the caveat that further relief was out-of-time by over six months. *Cf. Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause and prejudice exception includes impediment by official's interference).

V. *Amicus Curiae* United States' Concession that the Eleventh Circuit's Categorical Holding is Overbroad is Correct, But Its Conclusions About the Viability of Rule 60(b)(6) in the Present Case are Not.

Amicus Curiae United States stakes out a position of its own, separate and apart from respondent, and explicitly at odds with the Eleventh Circuit's categorical decision below, conceding that "[t]he court of appeals' test, limiting Rule 60(b) to instances of fraud and clerical error is unduly narrow." U.S. Br. 24. Instead of the Eleventh Circuit's categorical approach, the government advances its own test. Their test defines as second or successive Rule 60(b) motions

that challenge a federal court judgment that the claims presented do not support habeas relief, U.S. Br. 24-25, but permits Rule 60(b) relief,

> if the motion seeks relief predicated on the basis of an exceptional defect in the federal court's adjudicatory processes—an error that reflects a breakdown in the ordinary functioning of the court system, such that the initial judgment denying relief cannot be trusted or the prisoner otherwise did not receive a full and fair consideration of whether his claims provide a basis for federal relief—then the Rule 60(b) motion does not trench upon either AEDPA's text or purposes, and can be resolved as an ordinary Rule 60(b) motion.

U.S. Br. 25.

The government perceives a difference between its own test and that advanced by others, but its test is actually consistent with Mr. Gonzalez's approach to the Rule, with one exception noted below. According to the government, a Rule 60(b) motion may properly attack "a fundamental irregularity in the procurement or integrity of the initial habeas judgment" but "not . . . simply attack the correctness of the court's ultimate ruling." U.S. Br. 26. That position comports with Mr. Gonzalez's test because the first clause necessarily includes certain of the cases in the second clause; that is, a district court's incorrect decision to not entertain or rule upon a properly filed first petition is a fundamental irregularity in the procurement or integrity of the initial habeas judgment. An intervening decision that corrects that refusal to rule on the claim is, therefore, properly cognizable if it otherwise satisfies the requirements of Rule 60(b)(6).

The government's test is inadequate, though, in that it does not allow a Rule 60(b) motion to reopen a claim decided on the merits, which is effectively overruled by a later decision that is made retroactively applicable. *See infra* at 17-19. The government test requires a caveat for the rare, but important,

occasions when such decisions occur: A Rule 60(b) motion is not second or successive if it raises an intervening decision of the Supreme Court, made retroactively applicable on collateral review.

The government quarrels with Mr. Gonzalez's Suspension of the Writ and Due Process analysis. "[I]f accepted, petitioner's argument would preclude the application of any statute of limitations to federal habeas corpus actions" and would effectively "proscribe this Court's longstanding default rules." U.S. Br. 22. The government contends, further, that neither the Suspension nor Due Process clauses insure against legal error in adjudicating a habeas corpus case. Both responses overstate Mr. Gonzalez's argument and overlook the Court's approach to these constitutional provisions: A habeas petitioner has a right to have heard his timely-filed, exhausted, and not-otherwise-barred claims made in a first petition. These clauses do not bar courts from the proper application of limitations or procedural default rules, but rather prevent a court from refusing to address a timely-filed first petition making a non-defaulted and exhausted habeas claim.

In the end, the government questions whether Mr. Gonzalez's case presents extraordinary circumstances. This is a question that should be answered in the first instance in the district court. Certainly this case presents a plethora of circumstances that are extraordinary from which a district court may choose, including the type, number and combination of legal errors, repeated at every stage of the habeas proceeding and appeal, *see supra* at 7-8, 11-13, which deprived Mr. Gonzalez of his right to both a first habeas petition on issues of facial merit and the appellate review that Congress intended.

VI. Amici Curiae States' Apparent Call for a Rule More Strict than the Eleventh Circuit's Categorical Holding Conflicts With the Court's Decision in *Calderon v. Thompson*, is Inapposite to the Question Presented, and is Better Addressed by Rigorous Application of the Stay Provisions of 28 U.S.C. §§ 2251 and 2262(b)&(c).

Amici Curiae States address a singular concern, the potential abuse of Rule 60(b) by death-sentenced inmates who have an interest in delaying judgment. They offer the experience of one state, Tennessee, as an example, using the pending cases of five death-sentenced defendants. That situation is not present here. Mr. Gonzalez is not a capital defendant. His interest is not to delay judgment, but rather to correct a mistaken judgment as quickly as possible. *See Rhines v. Weber*, 125 S. Ct. at 1535 ("generally, a [non-capital] prisoner's 'principal interest . . . is in obtaining speedy federal relief on his claims'").

The categorical decision below does not alleviate the States' concerns. Four of the five capital inmates about whom they complain filed Rule 60(b) motions based on fraud, and the Eleventh Circuit's decision categorically holds that Rule 60(b)(3) fraud claims remain viable and cognizable even under AEDPA. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d at 1285-86; JA-64, 77. Any attempt to extend *Gonzalez*'s categorical bar to fraud allegations would conflict with *Calderon v. Thompson*, 523 U.S. at 557 (noting that fraud upon the court "call[s] into question the very legitimacy of the judgment").

The answer to the States' concern lies not in a categorical prohibition of Rule 60(b) relief—recharacterizing the motion to be something it is not, a second or successive petition—but rather in the proper implementation of the habeas corpus stay provisions by individual judges, in individual cases, based on a proper functional analysis both of the underlying motion

and the legal entitlement to a stay under 28 U.S.C. § 2251. For, "[i]f no stay is granted, any such [state court] proceeding shall be valid as if no habeas corpus proceedings or appeal were pending." *Id.*; *see, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (holding that issuance of stay under § 2251 is not automatic, but rather based on four considerations, "likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest"). Absent a stay, a Rule 60(b) filing causes no delay at all. *See, e.g., In re Hicks*, 375 F.3d 1237 (11th Cir. 2004) (denying motion for 11th-hour stay of execution accompanying attempted successive petition); *see also* 28 U.S.C. § 2262(b) & (c) (providing for automatic expiration of stays of execution and limiting federal courts' power to issue a second stay of execution after the first expires).

VII. Respondent and His Amici Envision a Statutory Scheme that is Incompatible with the Just Aims of Finality and the Legitimate Goals of AEDPA.

The inadequacy of the positions taken by respondent and his amici is revealed by illustrating how their respective contentions work in the real world of habeas corpus.

Respondent and some of his amici accord absolute finality to a final judgment in habeas (absent fraud), even one that erroneously denies relief. Under no circumstances do they believe that Congress or the Constitution allow a district court to correct an erroneous judgment, even if the habeas petitioner was effectively denied habeas review of his claims and even if an intervening decision of the Supreme Court corrects the erroneous interpretation of law that gave rise to the final judgment. There is a categorical prohibition on Rule 60(b) motions to reopen a case, they argue, even one that was procedurally dismissed in violation of existing law, and even if that dismissal is contrary to congressional intent in AEDPA.

In addition, they would not permit a federal court avenue for a supervening and retroactively applied decision of the Supreme Court to be applied to diligent inmates, who advanced, but lost, the identical issue before the supervening decision was issued. Thus, for example, the diligent inmate who unsuccessfully challenged *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state sodomy statute), would remain imprisoned despite the retroactively applicable *Lawrence v. Texas*, 539 U.S. 538 (2003) (holding unconstitutional state law prohibiting private act of consensual sodomy). The diligent death row inmates who perfected unsuccessful challenges to *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding death penalty for mentally retarded killers), and *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding death penalty for 16-17 year-old offenders), could still be executed despite the Court's intervening decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry* and prohibiting execution of mentally retarded offenders), and *Roper v. Simmons*, 543 U.S. __, 125 S. Ct. 1183 (2005) (overruling *Stanford* and prohibiting execution of 17-year-old juvenile offenders), even though those cases are to be applied retroactively. *Roper*, 125 S. Ct. at 1198 (holding that *Stanford* "should no longer control in those few pending cases or in those yet to arise"); *see In re Holladay*, 331 F.3d at 1172 (*Atkins* applies retroactively). Even a diligent inmate who advanced, unsuccessfully, a watershed change in the law would be denied the benefit of a later decision approving the watershed change; that is, if *Gideon v. Wainwright*, 372 U.S. 335 (1963), were decided today (rather than years ago), respondent and his amici have left no avenue for its application to diligent inmates who made the same claim in earlier habeas petitions that became final before the watershed decision.

Although the diligent inmate is denied the benefit of an intervening change of law, as respondent reads the successive application bar of 28 U.S.C. § 2244(b)(1), other less-diligent inmates who never filed a habeas petition, or who filed a

petition without raising the right later recognized, may obtain the full benefit of the intervening decision. *See* 28 U.S.C. §§ 2244(b)(2) (authorizing successive petition for new claims) and 2244(d)(1)(C) (authorizing out-of-time first petition for new claims).

There is no reason to believe Congress intended such disparate outcomes, for these results effectively negate the benefit of law for the class of inmates most deserving of the Court's *Teague* doctrine–a doctrine embraced in AEDPA's exceptions to *res judicata*–those who properly exhausted and perfected habeas claims on issues of constitutional dimension.

The United States understands this. It offers two alternatives for avoiding the conundrum. First, it joins the respondent's chorus: 'Trust us. The prosecuting sovereign will do the right thing, even if the federal courts have no power to do so. And there is always executive clemency, if the prosecutor or state courts fail to do the right thing.' If the sovereign's grace were truly enough, however, there would be no need for federal habeas corpus at all. The real world teaches just the opposite. The sovereign has a vested interest in defending its right to punishment and the sovereigns' vigorous advocacy in support of finality, in this case and others, is the rule, not the exception. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 124 S. Ct. 1847, 1855-56 (2004) (KENNEDY, J., dissenting) (noting prosecution's opposition to petition for release, and failure of executive clemency, for individual sentenced for crime he did not commit); *In re Holladay*, 331 F.3d 1169 (state vigorously contested stay of execution at 11th-hour, despite meritorious *Atkins* claim); *Arbelaez v. State*, __ So.2d __, 2005 WL 168570 (Fla. Jan. 27, 2005) (state courts sustained prosecutor's opposition to applying *Atkins*).

The United States' second alternative to the conundrum caused by the Eleventh Circuit's categorical decision is that every adversely impacted inmate could simply file an original habeas corpus petition in the Supreme Court. It is true that

this Court retains jurisdiction over original habeas corpus petitions. *Felker v. Turpin*, 518 U.S. at 660-61. But this Court is not properly equipped to develop a record in the first instance for most habeas corpus cases—taking evidence, making credibility determinations, and the like—tasks for which the district courts are both well-equipped and specifically designated by Congress. *See Exxon Mobil Corp. v. Saudi Basic Ind. Corp.*, 544 U.S. ___, 125 S. Ct. 1517, 1526 n. 8 (2005) (noting that Congress has explicitly empowered district courts to oversee federal habeas review of state prisoner petitions). Moreover, the original writ process recommended by the United States would swell the Court's docket following every supervening decision, to address what is now currently disbursed to 680 district courtrooms throughout the Nation.

The functional approach advanced by Mr. Gonzalez, on the other hand, is a disciplined formulation that respects AEDPA while acknowledging necessary exceptions to absolute finality of habeas judgments.

CONCLUSION

Mr. Gonzalez, the United States, and the vast majority of circuits reject the incorrect and problematic categorical holding of the Eleventh Circuit. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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